EXHIBIT A

No. 22

TWENTY-FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term 1975

Judgment Dismissing Appeal and Denying Certiorari

No. 7521SC126

STATE OF NORTH CAROLINA

v.

CALVIN LOUIS BRANNON

This matter came on to be considered upon motion of the Attorney General to dismiss the appeal of the defendant and upon defendant's petition for writ of certiorari; upon consideration whereof, it is adjudged by the Court here, that the motion to dismiss the appeal be allowed; that the petition for writ of certiorari be denied, and that it be so certified to the North Carolina Court of Appeals to the intent its decision be affirmed; the order for stay of execution of the judgment heretofore entered is hereby dissolved.

And it is considered and adjudged further that the defendent and surety to the appeal bond, United States Fidelity and Guaranty Company, do pay NINE AND NO/100 ($9.00) DOLLARS and execution issue therefor.

Witness my hand and the seal of the Supreme Court, this 26th day of June, 1975.

ADRIAN J. NEWTON
Clerk of the Supreme Court of North Carolina

By:
/s/ John R. Morgan
Assistant Clerk

EXHIBIT B

No. 7521SC126

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 1975

Forsyth County

No. 72CR47396

STATE OF NORTH CAROLINA

v.

CALVIN LOUIS BRANNON

Appeal by defendant from Exum, Judge. Judgment entered 17 September 1974 in Superior Court, Forsyth County. Heard in the Court of Appeals 16 April 1975.

The defendant, Calvin Louis Brannon, was charged in a warrant proper in form with the misdemeanor larceny of three dogs belonging to George O. Gunter.

The defendant pleaded not guilty but was found guilty by the jury. From a judgment that he be imprisoned for eighteen months, defendant appealed.

Attorney General Edmisten by Associate Attorney Raymond L. Yasser for the State.

Blanchard, Tucker, Twiggs & Denson by Irvin B. Tucker, Jr., for defendant appellant.

HEDRICKS, *Judge.*

Defendant assigns as error the denial of his motion to suppress any and all evidence regarding a leather dog leash seized pursuant to a search of the trunk of his automobile. After an extensive voir dire hearing on the defendant's motion to suppress, the trial court made detailed findings and conclusions, which included the following:

> "4. The search warrant offered in evidence as State's Exhibit Number Two was issued upon probable

> cause as set out in the affidavit to obtain the warrant as amplified by the testimony of Chief Wilson at the voir dire hearing and is a valid search warrant notwithstanding the fact that the magistrate signed the warrant in the space set aside for the affiant and that Chief Wilson signed in the space set aside for the signature of the magistrate."

Citing G. S. 15-26 which requires that a search warrant be signed by the issuing officer, the defendant argues that the search warrant in the instant case was not "properly signed" because the Chief of Police signed the search warrant and not the magistrate. The search warrant shows on its face that it was signed by the magistrate at the place set aside for the affiant and that the Chief of Police signed it at the place set aside for the magistrate. G. S. 15-27(b) provides that mere technical deviations in a search warrant does not invalidate the warrant. Clearly, the fact that the issuing magistrate's signature was misplaced on the warrant is a mere technical deviation, which does not invalidate the search warrant.

Next, the defendant contends the search warrant was issued "without affidavit," because the affidavit indicates that it was signed at 1:30 p.m., while the search itself shows on its face that it was issued at 1:20 a.m. While the record indicates that the affidavit was actually signed subsequent to the signing of the search warrant, the trial judge's finding and conclusion that the search warrant "was issued upon probable cause as set out in the affidavit to obtain the warrant" is supported by evidence adduced at the voir dire hearing and is conclusive on appeal. State v. Wingard, 9 N.C. App. 719, 177 S.E.2d 330 (1970), appeal dismissed, 277 N.C. 459, 178 S.E.2d 226 (1971).

Finally, defendant contends that the evidence in the affidavit to establish probable cause for the issuance of the search warrant was illegally obtained. In State v.

Harris, filed 16 April 1975, Judge Clark, speaking for this court, said:

> "We adopt the majority rule that where the search warrant is valid on its face, and the sworn allegations are sufficient to establish probable cause, the defendant may not dispute and attack the allegations, or the credibility of the affiant or his informant, in the voir dire hearing on the defendant's motion to suppress the evidence seized by law officers pursuant to the search warrant. State v. Salem, 17 N.C. App. 269, 193 S.E.2d 755 (1973), *cert. denied*, 283 NC. 259, 195 S.E.2d 692 (1973). See also Annot., 5 A.L.R.2d 394 1949)."

Therefore, since the search warrant is valid on its face and the sworn allegations in the affidavit are sufficient to establish probable cause, it is not necessary for us to discuss the validity of the allegations in the affidavit or the credibility of the affiant. We hold the search of the defendant's automobile and the seizure of the leather dog leash pursuant to the search warrant was proper and the trial court did not err in denying the defendant's motion to suppress the evidence.

Defendant attacks other findings and conclusions of the trial court sustaining on other grounds the validity of the search and seizure; however, in view of our decision holding that the search warrant is valid, it is not necessary for us to discuss these contentions. Defendant's one assignment of error is overruled.

No Error.

Judges Britt and Martin concur.

EXHIBIT C

No. 22

TWENTY-FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term 1975

STATE OF NORTH CAROLINA

v.

CALVIN LOUIS BRANNON

Notice of Appeal and Petition for Writ of Certiorari to North Carolina Court of Appeals To Review Its Decision

(Filed June 2, 1975)

NOTICE OF APPEAL

To: THE CLERK OF THE COURT OF APPEALS, CLERK OF THE SUPREME COURT, AND THE ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA:

TAKE NOTICE that the defendant appellant hereby gives Notice of Appeal to the Supreme Court of North Carolina, from the decision of the North Carolina Court of Appeals rendered herein, filed on May 7, 1975, and certified by the Clerk of the Court of Appeals on the 19th day of May, 1975.

This appeal is taken as a matter of right pursuant to North Carolina General Statutes 7A-30(1) from a decision involving a substantial question arising under the Constitution of the United States as follows:

(1) The defendant appellant Brannon's right against unreasonable search and seizure guaranteed by the Fourth Amendment to the Constitution of the United States made obligatory on the States by the Fourteenth Amendment was violated.

(2) The court overruled the defendant's motion to suppress and objections to the evidence of a dog leash found

locked in the trunk of the defendant's automobile while the automobile was in the yard of the defendant's mother, where defendant also lived, even though the search which resulted in the seizure of the leash was illegal and in violation of the defendant's rights under the Fourth and Fourteenth Amendments to the Constitution of the United States.

(3) The evidence of the dog leash was highly prejudicial to the defendant appellant Brannon, and without this evidence, the defendant's conviction cannot be upheld.

(4) The defendant did not waive the necessity of a valid search warrant.

(5) The officers violated what is known as the doctrine of the fruits of the poisonous tree, which forbids the use of illegally obtained evidence in the use of a search warrant in that they used the evidence illegally obtained from the trunk of the defendant's automobile in the affidavit to support the search warrant.

(6) The officers, when they found the leash in the trunk of the defendant's automobile, were illegally searching under a void arrest warrant.

(7) The officers, when they found the leash locked in the trunk of the defendant's automobile, were searching under the authority of an arrest warrant which was not supported by an affidavit sufficient to allow the search and seizure of property locked in the trunk of the defendant's vehicle.

(8) The defendant's vehicle, at the time of the search, was within the curtilage of the yard where the defendant and his mother lived.

(9) The defendant is the person aggrieved by the search.

(10) The search warrant was issued without a prior affidavit.

(11) The warrant and affidavit show on their face that the affidavit was sworn to more than twelve hours after the search warrant was issued.

(12) The constitutional question was raised in the trial court by a motion to suppress evidence of the dog leash and by objections to the evidence when the same was introduced at the trial.

(13) The officer, who first found the leash locked in the trunk of defendant's vehicle, was a Forsyth County Deputy Sheriff with no authority to search in Rowan County.

(14) The search warrant was based on false statements contained in the supporting affidavit.

(15) "Plain view" doctrine did not apply because the discovery of the leash locked in the trunk of the automobile was not inadvertent, and the incriminating nature of the leash was not apparent when first seen locked in the trunk of the vehicle through a hole in the trunk.

(16) The defendant's motion to suppress, which was heard on voir dire prior to the trial, is hereto attached, marked "Exhibit A", and made a part of this Notice of Appeal.

(17) The constitutional question was raised in the North Carolina Court of Appeals by assignment of error and as the first and only point of defendant appellant's brief filed with the North Carolina Court of Appeals. The defendant appellant's argument below is set forth in defendant appellant's brief filed with the North Carolina Court of Appeals, pages 6-35.

(18) In the trial court and in the North Carolina Court of Appeals, this constitutional question was passed upon and decided erroneously by the trial court and the North Carolina Court of Appeals.

This Notice of Appeal is being given within fifteen days of the date of the certification of the Opinion of the Court of Appeals.

This the 2nd day of June, 1975.

Respectfully submitted,

BLANCHARD, TUCKER, TWIGGS & DENSON

BY: /s/ IRVIN B. TUCKER, JR.
Irvin B. Tucker, Jr.
Attorney for Appellant
Post Office Drawer 30
Raleigh, North Carolina 27602
Telephone: 919 828-4357

BRIEF FOR THE RESPONDENTS IN OPPOSITION

INDEX

OPINION BELOW 1
JURISDICTION 1
QUESTIONS 2
STATEMENT OF THE CASE 2
RELEVANT FACTS 3
ARGUMENTS 5
CONCLUSION 10

TABLE OF CASES

ANGUILAR v TEXAS, 378 US 108 (1964) 9
BUMPER v NORTH CAROLINA, 391 US 548 (1968) 7
COOLIDGE v NEW HAMPSHIRE, 403 US 443 (1971) 8
GIORDENELLO v UNITED STATES, 357 US 480 (1958) 6
HARRIS v UNITED STATES, 390 US 234 (1968) 8
NORTH CAROLINA v WRENN, 417 US 973 (1974) 10
RUGENDORF v UNITED STATES, 376 US 528 (1967) 9
SCHNECKLOTH v BUSTAMONTE, 412 US 218 (1973) .. 9
STATE v BRANNON, 25 NC App 635, 214 SE 2d 213 (1975) cert denied 287 NC 665, ... SE 2d ... (1975) 1
WARREN v HAYDEN, 387 US 294 (1967) 8
WHITELEY v WARDEN OF WYOMING PENITENTIARY, 401 US 560 (1971) 6
WONG SUNG v UNITED STATES, 371 US 471 (1963) 6
ZAP v UNITED STATES, 328 US 624 (1946) 7

STATUTES

NC GS 7A-30(1) 1
NC GS §15-27(b) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-454

CALVIN LOUIS BRANNON,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The North Carolina Court of Appeals, at 25 N. C. App. 635, 214 S.E. 2d 213 (1975), found "no error" in Calvin Brannon's trial for larceny of the Gunter dogs. Calvin Brannon petitioned the Supreme Court of North Carolina for a Writ of Certiorari in the North Carolina Court of Appeals and also purported to appeal as of right from the Court of Appeals' decision pursuant to N.C. G.S. §7A-30(1). Upon answer by the Attorney General for the State of North Carolina, the Supreme Court of North Carolina dismissed the appeal and denied the petition for Writ of Certiorari on June 26, 1975. This decision is reported in 287 N.C. 665, ... S.E. 2d ..... (1975).

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. IS PETITIONER'S CONTENTION THAT THE STATE OF NORTH CAROLINA VIOLATED THE DOCTRINE OF "FRUIT OF THE POISONOUS TREE" BY ALLOWING THE SEIZED LEASH INTO EVIDENCE GROUNDLESS IN VIEW OF THE ACTUAL CIRCUMSTANCES OF THE SEARCH AND SEIZURE?

2. IS THE PETITIONER'S CONTENTION THAT THE SEARCH WARRANT USED IN THIS MATTER IS FATALLY DEFECTIVE DUE TO A TECHNICAL ERROR ON THE AFFIDAVIT MERITLESS?

3. EVEN IF PETITIONER WERE ALLOWED TO ATTEMPT TO IMPEACH THE FACTUAL AVERMENTS IN THE AFFIDAVIT FOR THE SEARCH WARRANT, WOULD THE AFFIDAVIT STILL SUPPORT A SHOWING OF PROBABLE CAUSE?

STATEMENT OF THE CASE

On January 11, 1973, Petitioner was tried in Forsyth County District Court on two charges of larceny of dogs. Petitioner pleaded not guilty, but was found guilty as to both charges. The warrants were consolidated for judgment and Petitioner was sentenced by the Honorable Robert K. Leonard, District Judge, to imprisonment for eighteen (18) months in the jail of Forsyth County. Petitioner appealed his convictions to the Forsyth County Superior Court where on June 4, 1973, he was given a trial *de novo* on the two charges. The Petitioner again entered pleas of not guilty, but was found guilty by a jury on both charges.

Petitioner appealed his conviction to the North Carolina Court of Appeals which, in a decision reported in 21 N.C. App. 464, 204 S.E. 2d 895 (1974), reversed his conviction as

to one charge, and granted a new trial in the matter now before the Supreme Court.

Petitioner was retried in Case 72CR47396. On July 25, 1974, Petitioner filed a motion to suppress certain evidence seized on October 22, 1973, by law enforcement officials. A *voir dire* hearing on the motion was heard on August 23, 1974 before the Honorable James Exum, Regular Judge of the Superior Court of Forsyth County. After the hearing, Judge Exum made findings of fact and conclusions of law and denied the Petitioner's Motion to Suppress.

On September 16, 1974, the Petitioner was tried, upon a plea of not guilty, for larceny of dogs in Case 72CR47396, and was again found guilty by a jury, and sentenced to a term of eighteen (18) months in the State Department of Correction. Petitioner appealed his conviction to the Court of Appeals which found "no error" in a decision dated May 7, 1975, and reported in 25 N.C. App. 635, 214 S.E. 2d 213 (1975). A petition to the Supreme Court of North Carolina for a Writ of Certiorari in the North Carolina Court of Appeals was denied and a direct appeal to the Supreme Court of North Carolina was dismissed on June 26, 1975, in a decision reported in 287 N.C. 665, ... S.E. 2d ..... (1975).

From this dismissal, Petitioner has filed the present petition for Writ of Certiorari to the Court of Appeals of North Carolina in the Supreme Court of the United States.

RELEVANT FACTS

In early September, 1972, Mr. George Gunter saw Calvin Brannon in the Gunter dog lot with chains around two dogs. When Gunter jumped out of his truck, Calvin Brannon jumped over the dog pen fence and ran away (R pp 9, 25). On the basis of this incident, George Gunter swore out a warrant in Forsyth County September 26, 1972, against Calvin Brannon charging him with attempted larceny of dogs (R p 9). As of October 21, 1972, this warrant had not been served on Calvin Brannon (R p 7).

On October 21, 1972, George Gunter and his Brother Charles, put three dogs, one belonging to George and two belonging to Charles, in the dog box of a pick-up truck in preparation for some hunting (R p 24). One of the dogs had a homemade leash, made by Charles, fastened to its collar (R p 24).

After placing the dogs in the dog box (about 7:30 p.m.), the Gunter brothers went inside George Gunter's house to have some coffee and change clothes (R p 24). When the brothers went back outside, the dogs were gone (R p 24). Charles Gunter had seen Brannon's car in the vicinity of George Gunter's home just before the theft (R pp 8, 13).

George Gunter notified Deputy Sheriff Weaver of the Forsyth Sheriff's Department of the theft and of his brother's sighting Brannon in the area (R p 8). Deputy Weaver and Gunter then went to East Spencer where they contacted the Chief of Police, Paul Wilson, who had been investigating Brannon due to other complaints about missing dogs and Calvin Brannon (R p 18).

Later that evening, Mr. Gunter, Deputy Weaver and Chief Wilson went to the home of Hattie Brannon (petitioner's mother) where Calvin Brannon sometimes lived (R p 10). Upon arriving at the home, the officers asked for Calvin Brannon. Mrs. Brannon said he was not there. The officers asked if they could look for Mr. Brannon, and Mrs. Brannon gave them permission and assisted in letting the officers in her home (R pp 10, 17). This search of the premises did not result in the finding of Calvin Brannon. However, while looking for Brannon in the area of Brannon's car, Deputy Weaver noticed some leashes—one resembling the leash made by Charles Gunter—in the trunk of Brannon's car (R p 12). These leashes were plainly visible due to a "a breathing hole made for breathing purposes where a dog or person could breathe. Looked like it had been jacked or prized open where they could get air through the car itself. The hole was of sufficient size that you

could see from outside into the trunk." (R p 20). George Gunter then looked at the leash through the hole in the trunk and stated that it resembled his brother's leash (R p 28). Deputy Weaver then opened the trunk to seize the leash, but Chief Wilson insisted upon getting a search warrant first (R p 16). By the time Wilson came back from Salisbury with this warrant, Calvin Brannon. who had been spotted coming out of some woods behind his Mother's home, had been detained (R p 19). Chief Wilson placed Brannon under arrest for attempted larceny of dogs and warned him of his rights pursuant to MIRANDA v. ARIZONA, 384 U.S. 436 (1966). Then, *before telling him about the search warrant*, but just after he had been warned of his rights, Chief Wilson requested permission from Calvin Brannon to search the automobile (R p 20). This permission was granted, Brannon saying "go ahead, lets do it. Open it up. Do what you want to do" with Brannon actually assisting in the search (R p 22). Brannon's sister testified that he was handcuffed at the time, but Chief Wilson testified, "I don't believe he was handcuffed on the street because he helped unlock the trunk and was there when we unlocked the trunk, but I don't recall." (R p 22). This consent of Brannon's was later denied—not by Brannon, who did not testify on *voir dire*—but by his sisters who were present during some of the arrest and search. The leash found in the trunk was positively identified by George Gunter as his brother's leash (R p 26).

REASONS FOR DENYING THE WRIT

I.

THE SEARCH AND SEIZURE COMPLAINED OF IN THIS MATTER WAS LEGAL; THEREFORE THE FRUIT OF THE POISONOUS TREE DOCTRINE IS INAPPLICABLE.

Calvin Brannon, the Petitioner herein, has mounted a multifaceted attack on the search conducted on the premises of his mother's home on October 22, 1972, which resulted in the

seizure of highly incriminating evidence against him. He claims that the "fruits of the poisonous tree" doctrine of WONG SUN v. UNITED STATES, 371 U.S. 471 (1963) precludes the use of this evidence. However, when the facts as elicited during the voir dire in this matter are examined, it is clear that the decision of the North Carolina Court of Appeals does not conflict with any decisions of this Supreme Court.

Petitioner first alleges that the police had no right to search incident to a lawful arrest, because the arrest warrant the police possessed was void for lack of probable cause. In support of his argument Petitioner relies on GIORDENELLO v. UNITED STATES, 357 U.S. 480 (1958), and WHITELEY v. WARDEN OF WYOMING PENITENTIARY, 401 U.S. 560 (1971). However, Petitioner's reliance on these cases is inappropriate on the facts of the present matter. In WHITELEY, supra, the arrest warrant was found on the basis of the record not to support probable cause where the complaint consisted of nothing more than the complainant's conclusion that a burglary occurred and where the record showed that the complainant relied entirely on an informer's tip. The arresting officers had no independent probable cause aside from the warrant to arrest Whiteley. In the present matter, the complainant is the owner of the dogs and saw Brannon attempt the theft. Thus, he was acting on direct knowledge when he swore out the warrant. The arresting officers had sufficient independent corroborative evidence to support the arrest; the complainant was with the officers and both officers knew the details of Brannon's attempted larceny. Therefore, unlike the officers in WHITELEY v. WARDEN OF WYOMING PENITENTIARY, supra, the officers had sufficient probable cause to arrest on the attempted larceny matter aside from the warrant.

Even if the warrant were void, the law enforcement officers were still lawfully on the premises of the Brannon home because there was probable cause for the initial entry, consent for the initial inspection, initial discovery in plain view, and

ultimate seizure pursuant to a valid consent and warrant. Mr. Gunter's and his brother's dogs had just been stolen. Brannon, who had earlier been caught in Gunter's dog pen, was seen in the vicinity of the larceny shortly before the larceny, and Chief Wilson had Brannon under observation due to complaints about missing dogs and Brannon's apparent implication in these disappearances. These facts certainly constituted probable cause for the law enforcement officers initially to investigate Brannon in connection with the theft of the Gunter dogs, and provided a valid reason for the officers to go to the Brannon residence separate and apart from serving the warrant for attempted larceny.

When Deputy Weaver and Chief Wilson got to the Brannon home, Mrs. Brannon clearly consented to the officers' search of the premises for Calvin Brannon who she said was not home. A search authorized by consent is, of course, wholly valid. ZAP v. UNITED STATES, 328 U.S. 624 (1946) Both officers, the witnesses least likely to have a strong personal outcome in this matter, testified that Mrs. Brannon advised them that the officers could look for Calvin Brannon, and Chief Wilson testified that Mrs. Brannon assisted in letting them in the house (R p 17). There is no testimony on *voir dire* that the officers attempted to threaten Mrs. Brannon or her daughters, or asserted a legal right to search. They did not claim to have a search warrant or anything that would give them such authority; they merely stated they had an arrest warrant, a process that gives no authority to search on its face. Thus, Brannon's assertion that his mother's actions were mere acquiesence in a claim of lawful authority as found in BUMPER v. NORTH CAROLINA, 391 U.S. 548 (1968) is not based on fact. Further, it is not even consistent with the defense at trial for there, Mrs. Brannon testified that she did not give the officers permission to search at all (R pp 32, 33). Therefore, since Mrs. Brannon had consented to the search, when Deputy Weaver began looking into the petitioner's car parked in her yard, he was in a place where he had a

lawful right to be.

During the course of this inspection from outside the car, Deputy Weaver first ascertained that Brannon was not hiding in the seat of the car (R p 12). Then he noticed that the trunk lid "had a place bent up in it" (R p 12) through which he could plainly see into the trunk .When he looked into it, he saw many leather leashes, one of which matched the description Gunter had given to his brother's leash. Therefore, the leashes were not "fruit of the poisonous tree" since "[i]t has been long established that objects falling in plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." HARRIS v. UNITED STATES, 390 U.S. 234, 236 (1968). The applicability of this principle is unchanged by COOLIDGE v. NEW HAMPSHIRE, 403 U.S. 443 (1971). While it is true that the search itself was not inadvertent, the law enforcement officers were looking for Calvin Brannon, not making a general exploratory search for evidence and in the course of looking for the Petitioner, Deputy Weaver did inadvertently come across the evidence. This places the instant case within the holding of WARDEN v. HAYDEN, 387 U.S. 294 (1967).

After Mr. Gunter confirmed that the leash appeared to be his (R pp 12, 27-28), Chief Wilson got a search warrant from the Rowan County Magistrate. Before he returned to the Brannon home with it however, Calvin Brannon came out of the woods behind his mother's house whereupon he was placed under arrest and given warnings pursuant to the *Miranda* case. When Chief Wilson arrived, he asked petitioner for permission to search the car, which permission petitioner granted saying "Go ahead, open it. Do it. You can do what you want to." (R p 22). Only after being told this did Chief Wilson then inform Brannon that he also had a search warrant (R p 23). On these facts, the trial judge properly found that Calvin Brannon had consented to this search. Even though his consent was obtained after arrest and may be somewhat suspect

on this ground, the fact of arrest alone does not preclude a voluntary consent, for voluntariness "is a fact to be determined from all the circumstances," SCHNECKLOTH v. BUSTAMONTE, 412 U.S. 218 (1973).

Thus, Petitioner's claim that the introduction of the leash into evidence constituted a violation of the fruit of the poisonous tree is meritless. Both searches involved were sanctioned by the consent of either Brannon or his mother, and even if Brannon's consent was not considered not voluntary, the search warrant was based upon completely legal evidence supplied to the magistrate by Chief Wilson, and it alone permitted the search as well. Therefore, certiorari should not issue on the basis of this contention.

II.

THE AFFIDAVIT FOR THE SEARCH WARRANT IS NOT FATALLY DEFECTIVE.

The next allegation is that the search warrant was invalid since it was allegedly issued without a supporting affidavit. This assertion is based on the fact that the face of the affidavit recites it was sworn to at 1:30 P.M. although the warrant was issued at 1:30 A.M. However, the facts established on *voir dire* clearly indicate that the information was sworn to by Chief Wilson before the warrant was issued, and that the initials "P.M." were written by mistake. On this basis, the trial court found as a fact that the warrant was issued pursuant to the affidavit (Finding of fact 15 R p 42). Therefore, Brannon's assertion is simply factually incorrect in this regard and his reliance on AGUILAR v. TEXAS, 378 U.S. 108 (1964) is inappropriate. This contention involves only a peripheral inaccuracy which does not invalidate the warrant under either federal law, RUGENDORF v. UNITED STATES, 376 U.S. 528 (1964), or state law, N.C.G.S. 15-27(b) and does not warrant the issuance of writ of certiorari.

III.

THERE ARE NO FALSE STATEMENTS IN THE SEARCH WARRANT.

Of main interest legally in the instant writ is the question of whether or not impeachment of factual averments in an affidavit should be allowed. The North Carolina Court of Appeals indicated in its review of Petitioner's case that North Carolina continues to follow the majority rule of not allowing such impeachment, c.f. Mr. Justice White's dissent in NORTH CAROLINA v. WRENN, 417 U.S. 973 (1974). However, its statement in this regard was dictum and therefore of no consequence in this case. This is because the trial court allowed the impeachment to be made, but after hearing all the evidence, found the facts to be that the affiant had testified to the Magistrate truthfully and in accord with the averments set out in the affidavit for the search warrant (Findings of Fact 14, 15 (R p 42)). Therefore, Brannon's argument is really based on his feeling that Judge Exum should not have believed the testimony of the officers and Gunter on *voir dire*, and is not based on any credible showing of falsity with regard to the evidence on *voir dire*, or any prevention of an attempt to show such falsity. Under these circumstances, a writ of certiorari should not issue to review this matter.

CONCLUSION

For the foregoing reasons the State of North Carolina requests that the petition in the Supreme Court of the United States for a Writ of Certiorari to the North Carolina Court of Appeals be denied.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General of North Carolina

RICHARD N. LEAGUE
Assistant Attorney General
A Member of the Bar of the Supreme
Court of the United States

JOAN H. BYERS
Associate Attorney General

Counsel for the State of North
Carolina, Respondent

Justice Building
Post Office Box 629
Raleigh, North Carolina 27602

Telephone: (919) 829-7387

CERTIORARI DENIED